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No. 90-1317

FILED
MAR 20 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

HOPE EVANGELICAL LUTHERAN CHURCH,

Petitioner,

v.

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

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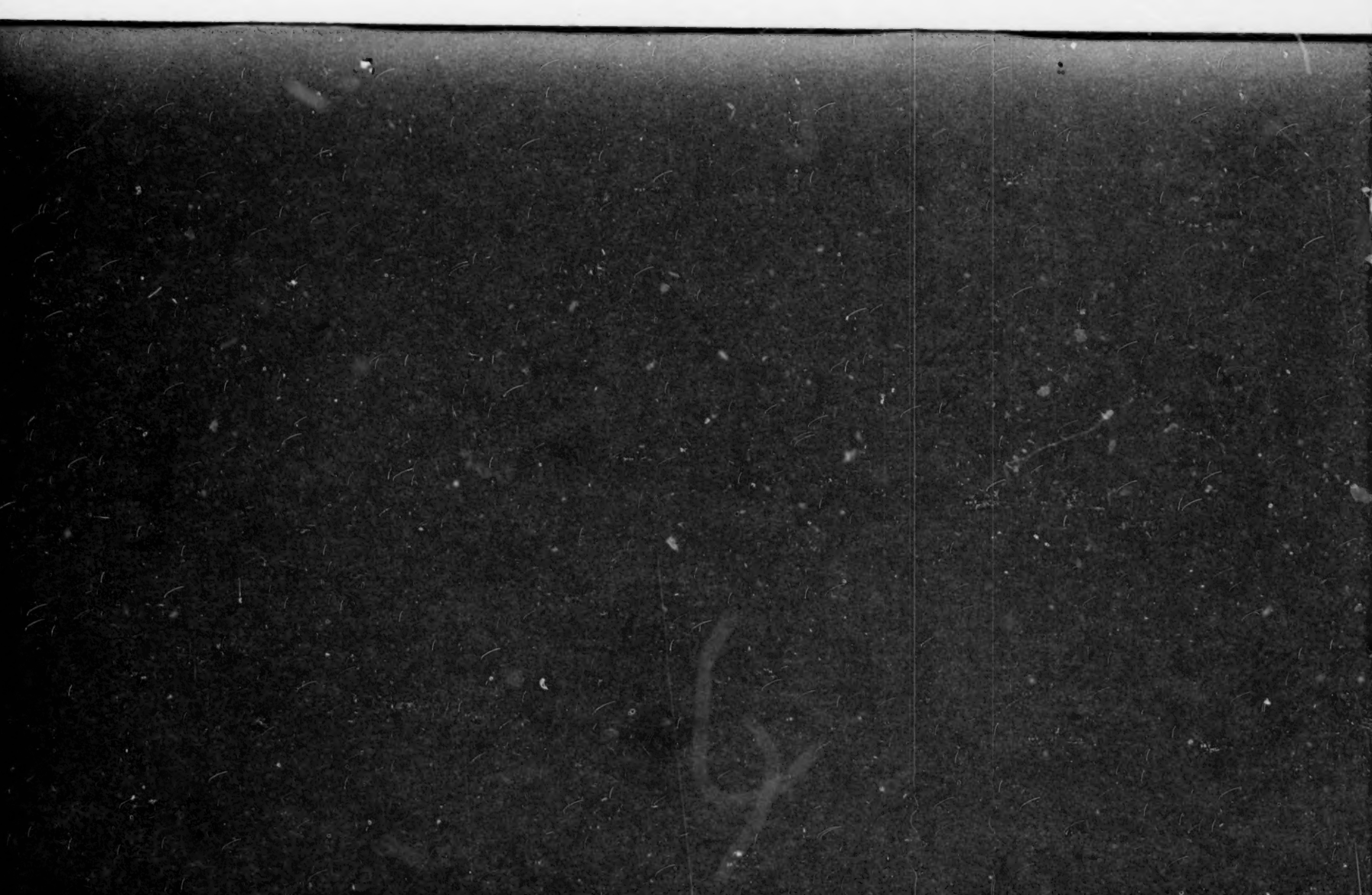

QUESTIONS PRESENTED FOR REVIEW

1. Does the Free Exercise Clause of the First Amendment to the U.S. Constitution require Iowa to grant churches an exemption, from its generally applicable sales and use tax scheme of excise taxation, for all tangible personal property which is religious in nature and may at some point in time be used or consumed in the conduct of religious services?

2. Does the Freedom of the Press Clause of the First Amendment to the U.S. Constitution require Iowa to exempt, from its generally applicable sales and use tax scheme of excise taxation, all "uses" of written materials by a church?

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CONSTITUTIONAL PROVISIONS AND STATUTES

The Iowa Department of Revenue and Finance (hereinafter the "Department") agrees with Petitioner's statement of the constitutional provisions and statutes applicable to the present case with two very important exceptions. First, although Petitioner cited in its Petition on page 1 to the Establishment Clause, the Free Exercise Clause, the Free Speech Clause and the Freedom of the Press Clause of the First Amendment to the United States Constitution, it is important to note that the only issues properly before this Court are those implicating the Free Exercise Clause and the Freedom of the Press Clause since these were the only issues specifically raised, developed and considered at the administrative level. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 700 (1990); *Hope Evangelical Lutheran Church v. Iowa Department of Revenue and Finance*, 463 N.W.2d 76, 82 (Iowa 1990); *Kartridg Pak Co. v. Department of Revenue*, 362 N.W.2d 557, 561 (Iowa 1985).

Secondly, one critical Iowa statute was neither cited nor quoted by Petitioner. That statute is Iowa Code § 423.1(1) which defines the term "use", within the context of Iowa's excise use tax, in pertinent part as follows:

> "Use" means and includes *the exercise* by any person *of any right or power* over tangible personal property incident to the ownership of that property . . . .

(Emphasis added).

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accepted by the Department as substantially correct. The following important facts were, however, omitted and the nature of and legal incidence of Iowa's use tax was mischaracterized as explained below.

The present case involves an Iowa excise tax assessed on the "use" in Iowa of certain items purchased by the Hope Evangelical Lutheran Church which is located in Cedar Rapids, Iowa (hereinafter "Hope"). All items were purchased by Hope from out-of-state suppliers. It was undisputed that the items involved were shipped to Hope and accepted by Hope in Iowa. In this case, Hope's sole argument is that its "use" in Iowa of certain of these items cannot be subjected to taxation because the items are religious in nature.

The original assessment involved taxes on the "use" in Iowa of the following consumer items: oven, garbage bags, adhesive, lights, books, furnace filters, cleaners, supplies, salt, candles, wire, paint primer, paint supplies, battery, folding partition, cards, bulletins, towels, certificates, paper, cloth, publications, envelopes, home altars, credit memos, subscriptions, candle lighter, stencils, book tapers, flower chart card, hood kit, coin collection, exam kit, forms, printing, roll kit, cradle roll, crosses, anniversary directories, lawn mower, pins, hymnal companion, word and witnesses materials and similar items. Hope argues that, of the items listed above, the state of Iowa must exempt, from its generally applicable excise tax, all of those items which it claims are of a religious nature

and which may, at some point in time after their purchase, be used or consumed in a religious practice.

Hope's characterization of Iowa's use tax as a tax imposed on its use of the disputed articles "in its religious services" is both factually and legally incorrect. Iowa's four percent sales tax, as are most such taxes in the Nation, is a generally applicable retail sales tax whereby gross receipts from retail sales of tangible personal property are taxed. In addition, in order to reach those retail sales that cannot be subjected to state sales tax, Iowa (as is the case in most states which impose sales taxes) also imposes a complimentary generally applicable four percent retail use tax whereby the use in Iowa of all tangible personal property is taxed. *Dain Mfg. of Iowa v. Iowa State Tax Commission*, 237 Iowa 531, 22 N.W.2d 786 (1946). One major purpose of the Iowa use tax is to prevent evasion of payment of the Iowa sales tax by the purchase of goods from outside the state. *People's Gas & Elec. Co. v. State Tax Com'n*, 28 N.W.2d 799, 802 (Iowa 1947).

As a matter of law, the incidence of Iowa's use tax is on the consumer and attaches to such property at the moment when it is purchased for use in and then actually comes to rest in the state. *City of Ames v. State Tax Com'n.*, 71 N.W.2d 15, 20-21 (Iowa 1955). In fact, the Iowa legislature specifically defined "use" for purposes of this statute as broadly as possible, in order to effect its purpose, and it includes "the exercise by any person of *any right or power over* tangible personal property incident to the ownership of that property." Iowa Code § 423.1 (1). This would, of course, cover such non-religious "uses" as acceptance, removal of packaging, retention, storage, and

distribution of all tangible personal property including bibles, candles, garbage bags, etc., all of which occur prior to any other secondary "use" such as the actual "consumption" of any item in "worship." Thus, Iowa's "use" tax attaches and would be due long before any of the disputed items involved could have been employed in any religious activity. It is this prior "use" which was taxed in the present case and which occurred long before any of the articles taxed could have been employed in any act of "worship."

The same is true of Iowa's use tax as it applies to bibles, other books and other written materials. The reading of these items is ***not*** the "use" which subjects their purchase to the tax, it is merely one possible subsequent "use." The initial acceptance, removal of packaging, storage, display, and distribution are all prior "uses" which trigger the tax before any written materials would or could be read. Iowa's tax is imposed totally independent from any religious "use" of tangible personal property.

SUMMARY OF THE ARGUMENT

Hope has cited no authority which is in conflict with the Iowa Supreme Court's decision in the present case. Further, the two United States Supreme Court cases cited and relied upon by Hope, *Follett v. McCormick*, 321 U.S. 573 (1944) and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) have already been distinguished by this Court in *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688. Finally, the *Jimmy Swaggart Ministries* case, *Texas Monthly Inc. v. Bullock*, 109 S.Ct. 890 (1989);

Hernandez v. Commissioner, 109 S.Ct. 2136 (1989); and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) are all directly on point and dispositive of each and every issue presently argued by Hope. Thus, since no basis for the grant of certiorari has been presented, certiorari should be denied.

REASONS TO DENY THE PETITION

I. PETITIONER HAS IDENTIFIED NO SPECIAL OR IMPORTANT REASONS WHY A PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE PURSUANT TO SUPREME COURT RULE 10.

Hope has cited only three cases to this Court, all of which are United States Supreme Court cases. Hope has cited no conflicting decisions by other state courts of last resort on any of the issues presently presented. (Table of Authorities, Petition for Writ of Certiorari, p. iii.) Further, no conflicting federal district court or United States Courts of Appeal cases have been cited by Hope. *Id.*

Of the three Supreme Court cases cited, two of those cases, *Follett v. McCormick*, 321 U.S. 573 and *Murdock v. Pennsylvania*, 319 U.S. 105, dealt specifically with direct flat regulatory licensing or solicitation fees upon Jehovah's Witnesses who, as a part of their religious practices, proselytized door-to-door. This Court very recently addressed Hope's present arguments as to the appropriate application of those cases. This Court ruled specifically that the flat fee occupational taxes involved in those two cases are quite different from excise taxes placed on the purchase and/or use of personal property

by churches or ministers and ruled that because the taxes involved in those two cases were substantively different in nature, those two cases were clearly distinguishable from and do not apply to or control in a sales or use tax challenge. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688. *Accord, Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890; *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). *See also, Alabama v. Toolen*, 167 So. 2d 546 (Ala. 1964); *State v. Van Daalan*, 11 N.W.2d 523, 525 (S.D. 1943) (the court limited and distinguished its own ruling in that case from one in which a tax is placed on property used or employed in connection with religious activities citing *Murdock*). Thus, two of the three cases cited by Hope have already been specifically distinguished by this Court and the Court has ruled that they do not apply to the types of taxes involved in the present case. Quite simply, Hope's arguments based on these two cases have already been made by others and were unequivocally rejected by this Court. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688.

Finally, in the third and final case cited by Hope which is directly on point, the *Jimmy Swaggart Ministries* case, no Free Exercise Clause or Freedom of the Press Clause violations were found. The Iowa Supreme Court's decision in the present case is in full accord with the ruling in the *Jimmy Swaggart Ministries* case. Thus, since Hope has cited absolutely no applicable authority which supports its position and no authority from other jurisdictions in conflict with the Iowa Supreme Court's decision in this case, no important reasons for a grant of certiorari have been stated. Certiorari should be denied.

II. THE IOWA SUPREME COURT'S DECISION AS TO THE FREE EXERCISE CLAUSE ISSUE IS CONSISTENT WITH PRIOR PRECEDENCE AND NO UNSETTLED IMPORTANT QUESTIONS OF FEDERAL LAW HAVE BEEN PRESENTED BY PETITIONER.

It is axiomatic that churches and other religious institutions have ***not*** historically enjoyed any inherent constitutional blanket exemption from excise taxes placed on the personal property which they themselves purchase except so far as they may be specifically exempted by statutory enactment. *Walz v. Tax Commission*, 397 U.S. 664 (1970). This Court indicated long ago that these organizations must bear their fair share of this type of tax burden, absent a specific statutory exemption. *Murdock v. Pennsylvania*, 319 U.S. 105, 109; *Hernandez v. Commissioner*, 109 S.Ct. 2136. This view was, only a few months ago, revisited and reaffirmed by this Court in the *Jimmy Swaggart Ministries* case.

The present case is directly on point with and controlled by the *Jimmy Swaggart Ministries* case and Hope's attempt to distinguish the Iowa tax at issue is without merit. Although Hope indicates otherwise, California's sales and use taxes were ***both*** challenged in the *Jimmy Swaggart Ministries* case and were upheld. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 697. Further, Iowa's use tax is not distinguishable from the California use tax challenged and upheld in that case. California's use tax was imposed upon the purchaser whether or not the purchaser was a religious organization. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 691. The same is true of Iowa's

use tax. Iowa Code § 423.2 (1991). Both are generally collected by the retailer at the time the sale is made. This Court specifically ruled that these types of taxes, which apply to all sales and uses of tangible personal property in the state no matter who the purchasers are, do not act as an impermissible precondition or prior restraint on religious freedoms. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 694-697. Further, this Court has also recognized that a mere decrease in the amounts of money available to religious institutions to spend on their religious activities is not a constitutionally significant burden. *Id.* It is also well settled that generally applicable administrative and record keeping burdens including the attendant audit procedures may be constitutionally imposed on religious organizations. *Id.* at 698.

Finally, as a matter of law, an exemption based ***solely*** on the religious nature, content, or use of the tangible personal property purchased or the status of the purchaser as a religious institution, which Hope argues is required in this case by the Free Exercise Clause, would clearly violate the Establishment Clause of the First Amendment to the U.S. Constitution. *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890. Thus, since no real factual distinctions have been presented and no unsettled and important federal questions have been raised by Hope, it is clear that the *Jimmy Swaggart Ministries* and *Texas Monthly* decisions control in the present case and certiorari should not be granted.

III. THE IOWA SUPREME COURT'S DECISION AS TO THE FREEDOM OF THE PRESS CLAUSE ISSUE IS CONSISTENT WITH PRIOR PRECEDENCE AND NO UNSETTLED IMPORTANT QUESTIONS OF FEDERAL LAW HAVE BEEN PRESENTED BY PETITIONER.

Hope simply alleges it has a constitutional entitlement, grounded in the Freedom of the Press Clause of the U.S. Constitution, to an exemption from Iowa's generally applicable excise tax for all written materials it purchases from outside the state based solely on its status as a religious institution and the religious nature and content of the materials. No case law has *ever* been cited by Hope to support this claim. It is, in fact, now well settled that no such entitlement to an exemption exists, *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 694-696, and, additionally, any exemption for written religious materials based solely on their religious content would actually be repugnant to the First Amendment. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221; *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). Therefore, certiorari as to this issue should be denied.

CONCLUSION

For all of the above-stated reasons, the Department respectfully requests that Hope's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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